APPEAL NO. 022666
FILED NOVEMBER 27, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on July 26, 2002, with the record closing on September 25, 2002. The hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on January 28, 2001; that the claimant's impairment rating (IR) is 33%; and that the appellant (carrier) is not entitled to a reduction of the claimant's income benefits based on contribution from an earlier compensable injury. The carrier appeals the hearing officer's determinations on all the disputed issues and the claimant responds, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

**CONTRIBUTION**

The carrier contends that the hearing officer erred in his determination that the carrier is not entitled to a reduction of the claimant's income benefits based on contribution from an earlier compensable injury to the claimant's neck in 1988. Section 408.084(a) provides that, at the request of an insurance carrier, the Texas Workers' Compensation Commission (Commission) may order that impairment income benefits and supplemental income benefits be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries. In determining the reduction in benefits because of contribution of a prior compensable injury, the Commission is to consider the "cumulative impact of the compensable injuries on the employee's overall impairment . . . ." Section 408.084(b). Whether there is a cumulative impact, and, if so, the amount of such cumulative impact, is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94578, decided June 22, 1994. It is well-settled that "[s]imply proving the occurrence of a previous compensable injury will not sustain the carrier's burden to prove the interaction of that injury with the current one on the present impairment." Texas Workers' Compensation Commission Appeal No. 971348, decided August 28, 1997. The consideration of the cumulative impact from prior injuries requires an assessment not only of the impairment from previous injuries, but also an analysis of how the injuries work together. Texas Workers' Compensation Commission Appeal No. 950268, decided April 10, 1995. This analysis includes considering the IRs from the prior compensable injuries and the present injury, and the components of the IRs. *See* Texas Workers' Compensation Commission Appeal No. 950735, decided June 22, 1995; Texas Workers' Compensation Commission Appeal No. 951019 decided August 4, 1995.

The carrier had the burden of proof on the contribution issue. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). Having reviewed the record, we are satisfied that the challenged determinations of the hearing officer regarding the contribution issue are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly the hearing officer's determination that the carrier is not entitled to a reduction of the claimant's income benefits based on contribution from an earlier compensable injury is affirmed.

**MMI/IR**

The carrier also contends that the hearing officer erred in his determinations that the claimant reached MMI on January 28, 2001, and that the IR is 33%. The designated doctor's report of January 16, 2002, certified that the claimant reached MMI on January 28, 2001, with a 30% IR. Section 408.122(c) and 408.125(e) provide, in part, that the report of the designated doctor shall have presumptive weight and that the Commission shall base its determinations of whether the employee has reached MMI and the employee's IR on such report unless it is contrary to the great weight of the other medical evidence. *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.6(i) (Rule 130.6(i)). The designated doctor's report reflects that she used the correct edition of the American Medical Association Guides (Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)), however, it appears that she improperly rounded numbers and also improperly used the combined value tables. The hearing officer attempted to correct the designated doctor's report and recalculated the numbers to arrive at the 33% IR. With respect to the designated doctor's report, the hearing officer states the following:

> There are some problems with this rating. The IR's assigned for cervical extension and cervical left rotation are wrong, due to rounding errors. The DD found the maximum cervical extension angle to be 20 degrees, and according to Table 51 this dictates a 6% IR for 0 to 25 degrees of motion, not 4% as assigned by the DD. She found the maximum left lateral flexion to be 14 degrees, and according to Table 52 this dictates to 4% IR for 0 to 15 degrees of motion, not 2% as assigned by the DD. So the total WP IR for the cervical [range of motion] ROM should be 19%, not 15%.

In Texas Workers' Compensation Commission Appeal No. 980894, decided June 17, 1998, we specifically held that "rounding up" to the next higher angle on the chart could not be done given the structure of the ROM charts for spinal ROM impairment. This decision overruled contrary decisions that may have been issued earlier. Consequently, the hearing officer correctly noted that the designated doctor's report included rounding errors.

In addition, the hearing officer correctly notes that the designated doctor made further errors in the application of the combined value tables. Although the Appeals Panel has recalculated IRs in other cases, we believe the better practice here, given the multistep process required, is for the designated doctor to recalculate her results and resubmit those on a Report of Medical Evaluation (TWCC-69) which assigns the IR. *See* Texas Workers' Compensation Commission Appeal No. 020355, decided April 4, 2002. Consequently, we reverse the hearing officer's determination that the claimant's IR is 33% and remand the case to the hearing officer to request that the designated doctor recalculate her results and resubmit those on a TWCC-69.

Further, we note that the claimant requests that we make alternate findings with respect to the proper IR, one finding that includes the rating for the claimant's neck condition and then another finding that excludes the neck condition. The claimant's request is based on the assertion that a jury in the district court determined that the neck condition is not a part of the compensable injury. Although there was no evidence in the record that there has been such a decision, it would seem to be an admission against the claimant's interest, and it would be prudent, given the return to the designated doctor, to also request the specific separate ratings, especially because the claimant had not yet decided whether to appeal the district court decision. Accordingly, the hearing officer shall request the designated doctor make alternative findings of IR, one including the rating for the claimant's neck and one excluding the rating for the claimant's neck.

In summary, the hearing officer's task is simple on remand; he is to forward the report to the designated doctor for recalculations to be made pursuant to the preceding paragraphs. He should then forward the recalculation to the parties for response prior to issuing his decision. Then, after considering the responses to the report, if any, from the claimant and the carrier, the hearing officer will render his decision giving presumptive weight to the designated doctor's corrected report as required by Rule 130.6(i).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **GENERAL INSURANCE COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**LINDA LEWIS**
**1600 NORTH COLLINS BLVD., SUITE 300**
**RICHARDSON, TEXAS 75080**.

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Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Veronica Lopez
Appeals Judge